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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) UNITHERM FOOD SYSTEMS, INC.,)
an Illinois corporation; and)
(2) JENNIE-O FOODS, INC.,)
a Minnesota corporation,)
Plaintiffs,)
v.)
(1) SWIFT-ECKRICH, INC. d/b/a)
CONAGRA REFRIGERATED FOODS,)
a Delaware corporation,)
Defendant.)

No. CIV-01-347-C

FILED

AUG 19 2002

ROBERT D. DENNIS, CLERK
U.S. DIST. COURT, WESTERN DIST. OF OKLA.
BY W DEPUTY

DOCKETED**ORDER**

On September 14, 1999, the United States Patent and Trademark Office ("PTO") issued Patent No. 5,952,027 (the "'027 patent") to Prem S. Singh ("Singh"). Mr. Singh filed the '027 patent application with the PTO on May 11, 1998. Mr. Singh subsequently assigned the '027 patent to Defendant Swift-Eckrich, Inc., d/b/a/ ConAgra Refrigerated Foods ("ConAgra"). Plaintiffs Unitherm Food Systems, Inc., and Jennie-O Foods, Inc. ("Unitherm"), have moved this Court to invalidate the '027 patent.

ConAgra, for its part, asks the Court to dismiss the Plaintiffs' causes of action numbered eight (tortious interference with existing contractual and business relations), nine (intentional interference with prospective economic relationships), ten (actual or constructive fraud), eleven (violation of the Sherman Antitrust Act), and twelve (violation of the

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Oklahoma Antitrust Reform Act). Due to prior Court Order and/or stipulations of dismissal between the parties, a grant of summary judgment for Defendant on the above causes of action would leave the Plaintiffs with one remaining cause of action - a declaration by this Court that U.S. Patent 5,952,027 (the "'027 patent") is invalid and unenforceable.

The Plaintiffs' claim of invalidity and unenforceability is discussed first, as it is from this Court's decision on the validity of the '027 patent that the other claims flow.

A. Plaintiffs' Motion for Partial Summary Judgment

1. Patent Validity

"Under 35 U.S.C. § 282, a patent is presumed valid and one challenging its validity bears the burden of proving invalidity by clear and convincing evidence." *Mas-Hamilton Group v. Lagard, Inc.*, 156 F.3d 1206, 1216 (Fed. Cir. 1998). The Court has previously presumed the '027 patent valid in the hands of its inventor (and assignee) and refused to order a requested transfer of inventorship. However, that does not mean that the patent is indeed valid, it is only presumed so.

Section 102 of U.S.C. Title 35 provides, in relevant part:

A person shall be entitled to a patent unless --

* * *

(b) the invention was . . . described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States.

Plaintiffs claim that the process disclosed in the '027 patent was on sale and/or in public use in the United States prior to May 11, 1997, and the patent is therefore invalid and unenforceable. To prove their assertion, Plaintiffs must show either "a definite sale or offer for sale of the claimed invention prior to the critical date" or a "public use" of the invention prior to the critical date. *Pfaff v. Wells Electronics, Inc.*, 124 F.3d 1429, 1433 (Fed. Cir. 1997), *aff'd*, 525 U.S. 55 (1998). Here, the critical date is May 11, 1997.

Plaintiffs maintain that David Howard of Unitherm is the true inventor of the process at issue, and that he offered the process for sale prior to May 11, 1997, even repeatedly offering it to the Defendant.¹ From the papers submitted, and as more fully discussed below, it is clear to the Court that David Howard and Unitherm indeed offered a process for sale as early as 1993. However, the question for the Court is whether the process offered by Mr. Howard was identical to the process in the '027 patent. Thus, the Court must examine not only the papers submitted by the parties, but also the patent itself. However, Defendant has objected on admissibility grounds to each of the nearly 80 exhibits attached to the Affidavit of David Howard ("Howard Affidavit") submitted by Plaintiffs in support of their motion. Defendant has moved to strike each of these exhibits. Therefore, before considering them in the context of these motions, the Court must first decide whether the exhibits are admissible.

¹ However, for the purpose of this motion only, Plaintiffs concede that the process was invented by Defendant, but argue that for this issue it is immaterial.

2. Admissibility

Defendant objects to the exhibits attached to the Howard Affidavit on authentication/hearsay grounds. The Court discusses each of these bars to admissibility in turn below. The motion to strike is contained solely in footnotes to Defendant's response brief. The Court condemns this practice, but, rather than delay the case by requiring the filing of a separate motion and brief, the Court now decides the motion.

a. Authentication

Fed. R. Evid. Rule 901(a) states, in relevant part:

The requirement of authentication . . . as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Rule 901(b)(1) renders Defendant's objections frivolous as the exhibits are attached to, or are in actuality, sworn affidavits of a "witness with knowledge" that the documents are what they are claimed to be. *Id.* Further, the Amended Howard Affidavit submitted with Plaintiffs' Reply brief remedies any arguable failings of the initial Affidavit. Thus, the Court finds that the documents attached to the Howard Affidavit are properly authenticated.

b. Hearsay

Defendant also attacks many of the exhibits as inadmissible hearsay. Fed. R. Evid. 801. However, the Court agrees with the Plaintiffs' contention that the exhibits fall under the "business records exception" to the hearsay rule found in Fed. R. Evid. 803(6). The Court also agrees that not only are the records of one's own business excepted from the

hearsay rule, but also records received from other businesses, where, as here, the requirements of Fed. R. Evid. 803(6) are met. *United States v. Johnson*, 971 F.2d 562, 571 (10th Cir. 1992). The Court finds that the authenticated exhibits attached to the Howard Affidavit fall under a hearsay exception and are admissible. Thus, the Defendant's Motion to Strike is hereby DENIED.

Having dispensed with the evidentiary objections, the Court now discusses the exhibits submitted by the Plaintiffs to ascertain what "process" may have been developed by David Howard, and what he offered for sale prior to May 11, 1997.

3. *Unitherm's "Process"*

From the submitted exhibits the Court finds that Unitherm was attempting to sell ovens along with its process for browning and/or smoking muscle meats as early as 1993. Prior to May 11, 1997, the process consisted of the following:

Removing purge material from a pre-cooked whole muscle meat product using hot water, drying the rinsed product prior to applying browning and/or smoking agent by either rapidly conveying the rinsed product through a circulating air oven at 350°C for less than one minute or by using the first zone of the oven for drying and then applying a browning and/or smoking agent between the first and second zones. Browning and/or smoking the product over a range of temperatures (from about 250°C to 350°C) to obtain a spectrum of colors, with product shrinkage of as little as 1% or less. Liquid smoke, Maillose, turkey broth, other flavorants and combinations thereof at overall concentrations of about 20-100% are used.

Some solutions comprising mixtures of broth and Maillose or liquid smoke have broth concentrations of 5%, 10%, and higher. Appendix G, Unitherm's Response to Interrog. Nos. 1, 8; Appendix E, Howard Aff., Exh. 11.

A promotional video ("the Proctor/Unitherm video") filmed September 14, 1993, in Elk Grove, Illinois, includes demonstrations of pre-cooked, whole muscle turkey breasts and hams being, or which have been, dipped in a Maillose or liquid smoke solution and then conveyed through a RapidFlow oven. These products are shown beside a pre-cooked turkey breast that was taken out of the cooking bag and washed and dried, as were the other products, but was not dipped or browned. The video notes that a spray station can be added between oven zones for smoking, flavoring, or enhancing product browning. Appendix E, Howard Aff. ¶¶ 14-18, Exhs. 12A-G, 13, 81.

Importantly for this case, the Unitherm process was demonstrated to Syed Hussain, who was present on behalf of Defendant, at a "test" conducted on September 30, 1993, at Unitherm's facility. Plaintiff's Brief at 8, citing Appendix B, Defendant's Answer ¶ 14. Defendant admits that the "tests" involved applying Maillose to the surface of a fully cooked turkey breast and then conveying the breast through a RapidFlow circulating air oven at 280-300° C for 7 minutes. *Id.*

Unitherm data dated October 14, 1993, indicates "five different runs" were made at the behest of Defendant with dip times of one minute in solutions ranging from 50% to 5%. "Internal core temperatures were all 36° F (2° C) or less, with none increasing more than 3°

F (1-1/2° C). Yields of up to 98.7% were obtained.” Plaintiff’s Brief at 9; *citing* Howard Aff., Exh. 25. Defendant argues that the “runs” were made in the interest of Unitherm selling, not a process, but ovens to Defendant. In fact, Defendant alleges that it had earlier disclosed the process at issue to Unitherm. Plaintiffs’ Brief at 9; *citing* App. B, Def’s. Answer ¶¶ 12-14. However, this assertion is belied by the testimony of Messrs. Hussain and Singh - that they do not know how Unitherm “derived the concept of using liquid browning agent or liquid smoke in conjunction with the RapidFlow oven to brown whole muscle turkey products.” Plaintiffs’ Brief at 9 n. 6, *citing* App. J, Singh Dep. pp. 146-47; App. X, Hussain Dep. pp. 115-16, 158.

From October 26 to December 1, 1993, copies of the Proctor/Unitherm video were distributed, primarily by mail and at trade shows, throughout the industry. Transmittals and related letters accompanying the videos variously discuss: “the next generation of turkey browning systems;” successful uniform browning using Maillose; yields of 98-99%; processing times under eight minutes; application of Maillose by drenching, submersion, or between cooking zones; “the ‘browning’ process;” and an internal temperature rise of less than 1°C. *Id.*, Howard Aff., Exhs. 15-20. One letter states that the items in the video were processed in about seven minutes. *Id.*, Exh. 18.

Unitherm did not, and never intended to, patent the process at issue.

4. *Summary Judgment Standard*

Summary judgment is appropriate if the pleadings and affidavits show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). “[A] motion for summary judgment should be granted only when the moving party has established the absence of any genuine issue as to a material fact.” *Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 561 F.2d 202, 204 (10th Cir. 1977). The movant bears the initial burden of demonstrating the absence of material fact requiring judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it is essential to the proper disposition of the claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The critical question here is whether there is clear and convincing evidence that Defendant patented a process on May 11, 1998, that was on sale and/or in public use before May 11, 1997. As stated above, if the answer is affirmative, the Defendant’s patent is invalid and unenforceable. The Court must first construe the claims of the ‘027 patent to discern whether Mr. Singh should have been barred from patenting this invention.

5. *Claims*

In order to assess the “metes and bounds” of a patent, it is the Court’s role to interpret and construe the patent’s claims. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 970, 997 (Fed. Cir. 1995). “When a court construes the claims of the patent . . . the court is defining the federal legal rights created by the patent document.” *Id.* at 978. As repeatedly

stated by the Federal Circuit and the Supreme Court, the Court is the sole arbiter of claim construction. See *Markman* at 977. “To ascertain the meaning of claims, [the Court] consider[s] three sources: the claims, the specification, and the prosecution history.” *Markman* at 979, quoting *Unique Concepts, Inc. v. Brown*, 939 F.2d 1558, 1561 (Fed. Cir. 1991). “[I]deally there should be no ‘ambiguity’ in claim language to one of ordinary skill in the art that would require resort to evidence outside the specification and prosecution history.” *Markman* at 986. In this case the prosecution history of the ‘027 patent has not been submitted; thus, the Court relies solely on the claims and the specification for its construction of the ‘027 patent claims.

The Court has been made aware of a recent case, *Juicy Whip, Inc. v. Orange Bang, Inc.*, 292 F.3d 728 (Fed. Cir. 2002), where the court held that Orange Bang did not “present substantial evidence satisfying its clear and convincing burden of proof that it . . . practiced” a “complete embodiment[] of the claimed invention.” *Id.* at 738. The court further stated the general proposition that “oral testimony of prior public use must be corroborated in order to invalidate a patent.” *Id.* at 737-38. Here, because of the Court’s ruling that the submitted documentary evidence is admissible, there is voluminous corroborating evidence accompanying the deposition testimony in this case. Thus, the Court’s task is to discern whether Unitherm practiced a complete embodiment of the invention claimed in the ‘027 patent prior to May 11, 1997.

The '027 patent includes 36 claims (2 independent and 34 dependent) and is entitled: *Method for Browning Precooked, Whole Muscle Meat Products*. The first independent claim (1) is for:

A process for browning precooked, whole muscle meat products comprising: coating a browning liquid pyrolysis product onto at least a portion of the surface of a precooked whole muscle meat product; and then exposing the coated surface to an energy source and selectively heating the coated surface of the whole muscle meat product at a temperature and for a time sufficient to develop a golden-brown color on the exposed surface, without substantial shrinking the precooked, whole muscle meat product.

'027 patent, col. 8, ll. 4-14.

The rest of the claims are variations on the theme of Claim 1, utilizing different heat source temperatures (about 60° C. - about 290° C.), core meat temperatures (less than 5° C. - 13° C.), shrinkage (less than 1 - 4 wt. %), products (turkey, chicken, fish), browning liquid pyrolysis products (hardwood, sugar, dextrose), amount of browning product (.05 - 1.0 wt. %), masking agents or flavoring enhancing compositions, utilizing turkey flavor and/or broth in the browning liquid pyrolysis product (.5 - 15 wt. %), and energy sources (circulating air oven, impinging air oven, laser light, medium wavelength energy infra red radiation or microwave radiation). The Plaintiffs' chart of the parallels between the Unitherm process and the '027 patent succinctly demonstrates that the two "inventions" are one and the same. Plaintiffs' Brief at 28. Thus, the Court finds that the '027 patent describes the Unitherm process prior to May 11, 1997.

Defendant's only rebuttals are disputed interpretation of the claim terms "golden brown" and "browning liquid pyrolysis product," and that David Howard never publicly used or offered the Unitherm process for sale. These are discussed in turn below.

6. *Golden Brown*

To begin, the '027 patentee did not act as his own "lexicographer" and failed to specifically define the term "golden brown." *Rexnord Corp. v. The Laitram Corp.*, 274 F.3d 1336, 1342 (Fed. Cir. 2001), 2001 U.S. App. LEXIS 24810, *11 ("patent law permits the patentee to choose to be his or her own lexicographer by clearly setting forth an explicit definition for a claim term that could differ in scope from that which would be afforded by its ordinary meaning"). Thus, the Court views the term "golden brown" with its plain meaning to one of skill in the art. *Talbert Fuel Sys. Patents Co. v. Unocal Corp.*, 275 F.3d 1371 (Fed. Cir. 2002), 2002 U.S. App. LEXIS 241 *7, *supra*. "Golden brown" is defined as "a variable color averaging a strong brown that is yellower and slightly darker than gold brown, yellower and paler than average russet, and yellower and less strong than rust." *Webster's Third New International Dictionary*, 975 (1986).

Defendant argues that "a determination of 'golden brown' under the '027 Patent necessitates a Hunter-Lab Color Meter measurement of the L, A and B values of that product." Defendant's Response at 40. Defendant further asserts that *examples* in the specification limit the term golden brown to color measurements ranging from L=48.9-53.2; A=9.6-14.3; and B=29.8-39.9. However, "courts cannot alter what the patentee has chosen

to claim as his invention. . . limitations appearing in the specification will not be read into claims, and. . . interpreting what is *meant* by a word *in* a claim ‘is not to be confused with adding an extraneous limitation appearing in the specification, which is improper.’” (emphasis in original). *Intervet America, Inc. v. Kee-Vet Labs., Inc.*, 887 F.2d 1050, 1053 (Fed. Cir. 1989), *quoting E.I. Du Pont De Nemours & Co. v. Phillips Petroleum Co.*, 849 F.2d 1430, 1433 (Fed. Cir. 1988). “[C]ourts do not rework claims. They only interpret them.” *Id.*, *quoting Autogiro Co. of America v. United States*, 384 F.2d 391, 395-96 (Ct. Cl. 1967). The Court has “set forth the asserted claim[] in full above and it is clear that [it] make[s] no reference whatever to [limiting “golden brown” to LAB color measurements].” *Id.* at 1055.

The Court thus disagrees with Defendant’s unsupported assertion that “golden brown” is defined in the ‘027 patent. The Court finds that the specification only makes clear that the inventors used language such as: “The following examples are included to further illustrate the invention. *They are not limitations thereon*” (emphasis added). ‘027 patent, col. 5, ll. 48-49. The patentee had every opportunity to define by limit the term “golden brown” and chose not to do so. The Court finds that the closest thing to a definition of golden brown in the ‘027 patent appears at col. 1, ll. 15-18, “consumers place a premium on precooked, whole muscle meat products that have the same golden brown color . . . as their home-cooked counterparts.” The Court further finds that documents submitted by Plaintiffs, e.g. Howard Aff., Exhs. 1E, 44C, and 44F, clearly encompass a “golden brown” product.

Finally, Defendant's expert in sensory evaluation declares that "no system or test has been used to verify that the color computer printouts attached . . . to Plaintiffs' Motion . . . accurately reflect the color of a product with certain L, A and B values." Defendant's Response, Exh B, p. 2. However, because the Court finds that LAB values do not limit the term golden brown in the '027 patent, the assertion is irrelevant.

7. Browning Liquid Pyrolysis Products

Defendant also claims that Plaintiffs misconstrue the phrase "browning liquid pyrolysis product" by relying on the application of liquid smoke. Defendant states that there are a number of liquid smoke products that do not promote browning and those products are thus not browning liquid pyrolysis products as defined in the '027 patent. The Court finds that the term is not, as Defendant asserts, defined in the '027 patent. Second, the Court notes that there are other pyrolysis products which do not promote browning. However, it is undisputed that Unitherm sometimes used a browning liquid smoke product, which is a browning liquid pyrolysis product. Importantly, Unitherm's process also uses Maillose as a browning agent. Maillose is not liquid smoke but is undisputedly also a browning liquid pyrolysis product. The Court finds it enough that at least two such browning liquid pyrolysis products, as called for in the '027 patent, were used.

8. Public Use/On-Sale Bar

In *Pfaff v. Wells, supra*, the Supreme Court elucidated a two-part test for an on-sale bar: 1) the product must be the subject of a commercial offer for sale; and 2) the invention

must be ready for patenting. 525 U.S. at 67-68. Here, the Plaintiffs have stated undisputed facts which show, as a matter of law, that the Unitherm process was on-sale and ready for patenting as early as 1993. The Defendant argues that *it* did not sell or use the process in the '027 patent prior to the application cut-off date. While that may be true, the undisputed fact is that it was demonstrated and offered by Unitherm for sale to the Defendant. Therefore, the fact that it wasn't Defendant who made a public use or sale of the process is irrelevant. Even if Mr. Singh did invent the process at issue, it was unpatentable due to Unitherm's offer for sale prior to May 11, 1997. The correspondence between Unitherm and the Defendant establishes this finding as their co-existence in relation to a potential sale of the Unitherm process goes back at least to 1993.

Further, the fact that Unitherm sold its process to Hudson Foods and that Hudson Foods had product, produced by the Unitherm process, on the market by April 1997 is undisputed. Plaintiffs' Brief, Exh. N. Defendant stresses that Unitherm sold Hudson an oven, not a process. Hudson's representative claims that the process was in fact *Hudson's* and they purchased Unitherm's oven because, "they [Unitherm] had an oven . . . that would do this [in-line smoking and/or browning] better in this particular application." Exh. N at 159. It is undisputed that the "basic process [utilized by Hudson] was the same [as David Howard's]. Exh. N at 244. "[T]he primary change . . . was the addition of a conveyor system that took it through a [RapidFlow] oven." *Id.*

The Court finds Hudson's test data to reveal that after purchasing and utilizing Unitherm equipment, Hudson practiced a complete embodiment of the invention claimed in the '027 patent in February, 1997. See Exh. N at WB-000081-85. For illustration, the Court inserts the Hudson data parenthetically within Claim 1 of the '027 patent:

A process for browning precooked, whole muscle meat products (breasts) comprising: coating a browning liquid pyrolysis product (liquid smoke, MAILLOSE from 45 seconds to 70 seconds) onto at least a portion of the surface of a precooked whole muscle meat product; and then exposing the coated surface to an energy source (Unitherm 3-zone RapidFlow oven) and selectively heating the coated surface of the whole muscle meat product at a temperature and for a time sufficient to develop a golden-brown color (299° C. - 354° C. at 7m. 48 s. - 9m 30s. resultant colors from "dark" to "golden brown with black highlights")² on the exposed surface, without substantial shrinking (1.7 - 3.16%) the precooked, whole muscle meat product.

'027 patent, col. 8, ll. 4-14.

The Court finds the above to be clear and convincing evidence that the Unitherm process, patented by the Defendant, was on-sale and in use (by perhaps more than one company), prior to May 11, 1997.

Defendant repeatedly stresses to the Court that Unitherm's attempts to sell its process were confidential and thus not public. The Defendant misapplies the law of public use. The

² The Court notes that the temperature of 299° C. is higher than the upper range of 290° C. in the '027 patent. However, the Court also notes that the temperature in Example 1 of the '027 patent was 570°F. which converts to a temperature of 299° C. Further, the process offered for sale by Unitherm utilizes oven temperatures ranging from 250°-350° C. The undisputed "key" to the process of in-line browning and/or smoking is a calculus of temperature over time that results in the desired golden brown end-product.

purpose of the public use bar is “to require *inventors* to assert with due diligence *their* right to a patent through the prompt filing of a patent application.” *LaBounty Mfg. v. U.S. Intern. Trade Com’n*, 958 F.2d 1066, 1071 (Fed. Cir. 1992) (emphasis added). Defendant correctly asserts the proposition that “third party secret commercial activity . . . [should not act as] a [public use] bar [against ConAgra].” *Woodland Trust v. Flowertree Nursery*, 148 F.3d 1368, 1371 (Fed. Cir. 1998). This is to protect patentees from losing their patent rights when a third party has also practiced the invention at issue, without the patentee’s knowledge. This is not the case here. It is undisputed that employees for Defendant were aware of the technology as early as 1993. It is also undisputed that Hudson Foods purchased technology from Unitherm in February 1997, and a mass mailing of videos and associated correspondence, regardless of David Howard’s expectations of secrecy, resulted in the public distribution and offer for sale of the Unitherm process. It is absurd to argue that the technology was somehow “secret.” See *OddzOn Prods., Inc. v. Just Toys, Inc.*, 122 F.3d 1396, 1402 (Fed. Cir. 1997) (“secret prior art [is] art that has been abandoned, suppressed, or concealed”). The undisputed facts establish, as a matter of law, that “secret” prior art does not exist in this case and does not bar application of § 102(b).

The Court has closely examined the voluminous documentation submitted in connection with the present motions and concludes that the Defendant’s patent describes a process that was both on sale and in public use prior to May 11, 1997. Thus, the Court finds the 1999 issuance of the ‘027 patent was in error. Because the Court finds the ‘027 patent

to be invalid and unenforceable, it is not necessary to discuss the Plaintiffs' allegations of Defendant's fraud on the Patent Office. The Court now examines the remaining causes of action in turn, as the Defendant has moved for summary judgment on each.

B. Defendant's Motion for Summary Judgment

1. Antitrust Violations

Defendant argues that the two Plaintiffs' antitrust claims cannot succeed for different reasons: 1) Unitherm is not a competitor of the Defendant in the market for sliceable cooked turkey products; and 2) Jennie-O cannot show any antitrust injury as a result of any action of the Defendant. The Court agrees only with the latter and discusses each argument separately below.

a. Unitherm

The Sherman Act § 2 states, in relevant part:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony."

15 U.S.C. § 2.

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

The Clayton Act states, in relevant part:

“[A]ny person who shall be injured in his business . . . by reason of anything forbidden in the antitrust laws may sue therefor . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained. . . .”

15 U.S.C. § 15.

ConAgra argues that Unitherm cannot succeed on its antitrust claims because Unitherm is not a competitor of ConAgra and thus has no antitrust standing. The Court finds that the law is not as ConAgra argues it to be.

In *Walker Process Equip. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965), the Supreme Court held that “the enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided the other elements necessary to a § 2 case are present. In such event the treble damage provisions of § 4 of the Clayton Act would be available to an injured party.” *Id.* at 174.

ConAgra denies that it is a competitor of Unitherm, claiming that ConAgra processes meat while Unitherm sells ovens. But it is undisputed that ConAgra offers a browning/smoking process at a royalty of 10¢ per pound and Unitherm offered its browning/smoking process for sale as early as 1993. And ConAgra’s own documents previously produced in this action also support the conclusion that ConAgra is a competitor of Unitherm and that ConAgra is enforcing its patent.

Others in the industry may approach your company regarding this patent, and we would appreciate it if you would inform them

that we intend to aggressively protect all of our rights under this patent.

Plaintiffs' Brief in Opposition, Exhibit 9 (Letters from ConAgra to 15 prospective purchasers of the Unitherm system).

This Court has already found the reference to "others in the industry" sufficient to put Unitherm under apprehension of a lawsuit for patent infringement -- something which has since come to fruition with the filing of ConAgra's counterclaim. The fact that ConAgra has asserted a counterclaim for patent infringement on an invalid patent makes Unitherm's antitrust claim a viable one. *Walker Process*, 382 U.S. 172. The issue yet to be decided is whether ConAgra fraudulently obtained the patent. *See Walker Process, supra*. Thus, the Court finds that the undisputed facts are sufficient to withstand the motion for summary judgment on Unitherm's antitrust claims.³

b. Jennie-O

ConAgra next argues that Jennie-O's antitrust claims must be dismissed because Jennie-O cannot show antitrust injury. Jennie-O's theory of antitrust recovery differs from that of Unitherm. Jennie-O alleges a right to seek injunctive relief for prospective damage under § 16 of the Clayton Act. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 260-61 (1972), permits suit for threatened damage:

³ Because the Court has upheld Unitherm's antitrust causes of action under federal law, a discussion of the Oklahoma Antitrust Reform Act ("OARA") 79 Okla. Stat. § 205, is unnecessary. *See* 79 Okla. Stat. § 212 ("[OARA] shall be interpreted in a manner consistent with Federal Antitrust Law, 15 U.S.C. § 1, *et seq.* and the case law applicable thereto").

[Section] 16 of the Clayton Act, 15 U. S. C. § 26 which provides for injunctive relief [states, in relevant part]: “Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings”

Here, Jennie-O alleges that enforcement of fraudulently obtained monopoly rights in the '027 patent by requiring a 10¢ per pound royalty would “drive Jennie-O out of business.”

However, because the '027 patent is invalid, Jennie-O's standing to participate in a cause of action for prospective injunctive relief due to Defendant's alleged violations of the antitrust laws is moot. Jennie-O cannot be driven out of business by a competitor attempting to charge royalties on an invalid patent.

2. Tortious Interference with Existing Contractual or Business Relations

Under Oklahoma law, “one has the right to carry on and prosecute a lawful business in which he is engaged without unlawful molestation or unjustified interference from any person, and any malicious interference with such business is an unlawful act and an actionable wrong.” *Crystal Gas Co. v. Oklahoma Natural Gas Co.*, 1974 OK 34, 529 P.2d 987, 989.

To recover damages for the tort of malicious interference with a business relationship, a plaintiff must show:

1. That he or she had a business or contractual right that was interfered with.

2. That the interference was malicious and wrongful, and that such interference was neither justified, privileged nor excusable.
3. That damage was proximately sustained as a result of the complained-of interference.

Mac Adjustment, Inc. v. Property Loss Research Bureau, 1979 OK 41, 595 P.2d 427, 428.

Defendant correctly asserts that there must be more to a business relationship than speculation on the part of David Howard that he could have begun business relationships with new purchasers of the Unitherm process. The Court finds that Unitherm has not adduced material facts, other than the self-serving and unsubstantiated testimony of David Howard, that place this cause of action in dispute. Indeed, Unitherm has not expressly responded to this portion of Defendant's brief, instead arguing a right to proceed on its claim of Intentional Interference with Prospective Economic Advantage. Thus, the cause of action for Tortious Interference with Existing Contractual or Business Relations must fail.

3. Interference with Prospective Economic Advantage

The parties' briefs treat the tort of interference with business relations as synonymous with the tort of interference with prospective economic advantage. "This comparison is not entirely accurate. Although both torts do have similarities, the underlying theories of liability differ. Interference with a prospective economic advantage usually involves interference with some type of reasonable expectation of profit, whereas interference with a contractual relationship results in loss of a property right." *Overbeck v. Quaker Life Ins. Co.*, 1984 OK CIV APP 44; 757 P.2d 846, 847-48. Taking all circumstances in their totality, the Court

finds that there exist enough disputed facts to support this cause of action through the summary judgment stage.

It is undisputed that once the '027 patent issued, the Defendant mass mailed an arguably threatening letter throughout the industry. It is also the testimony of Robert Wood of Jennie-O that this letter had, at the least, a chilling effect on any further possibility of Unitherm selling its products to Jennie-O. Plaintiffs' Brief, Exh. 5, pp. 74-76. The Court thus finds that the cause of action for interference with prospective economic advantage is not susceptible to summary judgment.

4. Actual or constructive fraud

Defendant claims that Unitherm cannot prove fraud because Unitherm has failed to identify a material omission or misrepresentation made by the Defendant to Unitherm. The Court disagrees and denies summary judgment on this cause of action.

The Court notes that:

Oklahoma follows the view that fraud can be predicated upon a promise to do a thing in the future when the intent of the promisor is otherwise. This principle is an *exception* to the general rule that for a false representation to be the basis of fraud, such representation must be relative to existing facts or those which previously existed, and not as to promises as to future acts. . . . The gist of the rule is not the breach of promise but the fraudulent intent of the promisor at the time the pledge is made not to perform the promise so made and thereby deceive the promisee. There is a wide distinction between the nonperformance of a promise and a promise made *mala fide*, only the latter being actionable fraud.

Citation Co. Realtors, Inc. v. Lyon, 1980 OK 68, 610 P.2d 788, 790-91 (emphasis added), citing *State ex rel. Southwestern Bell Telephone Co. v. Brown*, 1974 OK 19, 519 P.2d 491.

Unitherm claims that ConAgra promised to consider the purchase of the Unitherm process which was first shown to ConAgra in 1993, and ConAgra then stole the process and patented it for its own use. ConAgra vigorously disputes this claim. The undisputed facts are that the Defendant considered purchasing Unitherm's technology and failed to do so. Under Oklahoma law, the disputed fact that the Defendant may have subsequently stolen Unitherm's technology supports a cause of action for breaching a promise to consider a purchase. The Court DENIES summary judgment on this count.

CONCLUSION

As discussed more fully above, Defendant's Motion to Strike is hereby DENIED. Plaintiffs are GRANTED partial summary judgment on their third cause of action and their sixth and seventh affirmative defenses to Defendant's Counterclaim (Patent Invalidity and Unenforceability). Plaintiffs are entitled to a judgment declaring the '027 patent invalid and unenforceable.

Defendant is GRANTED summary judgment on the Plaintiffs' eighth cause of action (tortious interference with existing contractual and business relations). Defendant is also GRANTED summary judgment on Jennie-O's antitrust claims.

Defendant's Motion for Summary Judgment is denied on remaining causes of action, i.e., intentional interference with prospective economic relationships, actual or constructive fraud, violation of the Sherman Antitrust Act (Unitherm only).

Finally, this ruling moots the Defendant's motion to strike Jennie-O's second affirmative defense of non-infringement, or, in the alternative, for partial summary judgment of infringement. A judgment will enter at the conclusion of these proceedings.

IT IS SO ORDERED this 19th day of August, 2002.

A handwritten signature in black ink, appearing to read "Robin J. Cauthron", is written over a horizontal line.

ROBIN J. CAUTHRON

CHIEF UNITED STATES DISTRICT JUDGE